IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 27, 2006

STATE OF TENNESSEE v. KENNETH SHANE STORY

Direct Appeal from the Circuit Court for Humphreys County
No. 10897-A & 10900 Robert Burch, Judge

No. M2005-02281-CCA-R3-CD - Filed August 9, 2006

The Defendant, Kenneth Shane Story, pled guilty to one count of manufacturing methamphetamine and two counts of possession of one-half gram or more of methamphetamine with intent to sell or deliver. The Defendant received an effective sentence of four years, all to be served on probation. Subsequently, a probation violation warrant was issued, and after a hearing, the trial court revoked the Defendant's probation. The Defendant appeals, claiming that: (1) he was not provided due process; (2) the trial court was not presented sufficient evidence to revoke his probation; and (3) the trial court erred in failing to provide him counsel. Finding no reversible error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Michael W. Patrick, Waverly, Tennessee (on appeal), and Kenneth Shane Story, pro se, Waverly, Tennesee (at trial), for the Appellant.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Lisa Donegan, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

On February 7, 2005, the Humphreys County Grand Jury indicted the Defendant in case number 10897-A and Case No. 10900. Both cases related to the production, possession, and distribution of methamphetamine. In early June 2005, the Defendant pled guilty to one count of manufacturing methamphetamine and one count of possession of one-half gram or more of

methamphetamine with intent to sell or deliver in case number 10897-A, and the Defendant pled guilty to one count of possession of more than .5 grams of methamphetamine with intent to sell or deliver in case number 10900. On June 21, 2005, the trial court sentenced the Defendant to an effective sentence of four years to be served on probation. As a condition of his probation, the Defendant was required to perform 100 hours of community service. On August 2, 2005, a probation violation report was filed, and a warrant was issued against the Defendant for violating his probation in case numbers 10897-A and 10900 by "failing to complete the Court Ordered Public Service Work as ordered by the Court and as scheduled in an agreement between [the Defendant's Probation] Officer and the [Defendant]." Specifically, the warrant claimed that the Defendant violated the conditions of his probation by violating Rule 6 of the probation order, which states:

> I will allow my Probation Officer to visit my home, employment site, or elsewhere, will carry out all lawful instruction he or she gives; will report to my Probation Officer as instructed; will comply with mandates of the Administrative Case Review Committee, if the use of that process is approved by the Court; will comply with a referral to Resource Center Programs, if available, by attending; and will submit to electronic monitoring and community service, if required.

On August 31, 2005, the Defendant appeared pro se at the violation of probation hearing. At the outset of the hearing the trial court stated, "Mr. Story, your hearing on a Violation of Probation is today. You were to hire a lawyer. Have you done so?" After the Defendant responded that he was not able to obtain a lawyer, the Court stated, "All right, you just have a seat right at that table there." During the hearing, the Defendant's probation officer, John McGranahan, testified that there was one basis for the warrant, a violation of Rule 6. Officer McGranahan testified that a condition of the Defendant's probated sentences was to complete 100 hours of community service. He further testified that he and the Defendant reached an agreement, which the Defendant signed, creating a schedule for the Defendant's community service. Officer McGranahan testified that, once this agreement was reached, it became part of the Defendant's probation file. The officer said that the agreement provided for the Defendant to arrive at the Humphreys County Courthouse at 7:30 a.m. the first three days of each week and assist in maintenance eight hours a day, starting June 20, 2005, and ending July 20, 2005. The remaining two days of each week were reserved for the Defendant's employment search. Officer McGranahan further testified that the Defendant had not abided by the agreed upon community service schedule, and, as of the hearing date, the Defendant had only performed 32 of the required 100 hours of community service. In response, the Defendant testified that, although he agreed that he had not completed his community service work as assigned by his probation officer, he had made alternative arrangements to finish his community service work starting September 24, 2005. The trial court found that the Defendant had violated the terms of his probation and revoked the Defendant's probation and ordered the Defendant to serve his sentence in the Department of Correction. This appeal ensued.

II. Analysis

On appeal, the Defendant contends that: (1) the State produced insufficient and inaccurate

evidence and insufficient notice to comply with the due process requirements; (2) the trial court did not have sufficient evidence to revoke his probation; and (3) the trial court erred in failing to appoint counsel to represent the Defendant at the probation violation hearing.

When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. Tenn. Code Ann. § 40-35-311(e) (2003). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. State v. Hunter, 1 S.W.3d 643, 644 (Tenn. 1999); see Tenn. Code Ann. § 40-35-310 (2003); Tenn. Code Ann. § 40-35-311(e); Tenn. Code Ann. § 40-35-308(c) (2003). The defendant has the right to appeal the revocation of his probation and entry of his original sentence. Tenn. Code Ann. § 40-35-311(e). Upon a finding of a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered . . . ." Tenn. Code Ann. § 40-35-311(e); Hunter, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension . . . ." Tenn. Code Ann. § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. See State v. Duke, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

A. Due Process

The Defendant contends that the State produced insufficient and inaccurate evidence and insufficient notice to comply with due process requirements. The Defendant claims on appeal that, although written notice was provided through the criminal warrant, the notice did not reflect the actual charges. The Defendant did not make these claims before the trial court. Generally, appellate courts review only questions presented for determination in the trial court. Hester v. State, 2 Tenn. Crim. App. 11, 450 S.W.2d 609, 611 (1969); State v. Samuel Kimoe Robinson, No. 01C01-9803-CC-00153, 1999 WL 173671, at *2 (Tenn. Crim. App., at Nashville, Mar. 31, 1999), *perm. app. denied* (Tenn. June 28, 1999). Because the Defendant raises these issues for the first time on appeal, we conclude that he has risked waiving these issues. Tenn. R. App. P. 36(a). Notwithstanding this procedural default by the Defendant, we elect to review the Defendant's claims.

A defendant who has been granted a suspended sentence and placed on probation has a conditional liberty interest that is protected by due process of law. See State v. Merriweather, 34 S.W.3d 881, 884 (Tenn. Crim. App. 2000); State v. Stubblefield, 953 S.W.2d 223, 225 (Tenn. Crim. App. 1997). In Black v. Romano, 471 U.S. 606, 613 (1985), the United States Supreme Court reiterated that the due process rights given in a probation revocation proceeding are not as expansive as those rights afforded to defendants in criminal trials. The Court stated, "[O]ur precedents have sought to preserve the flexible, informal nature of the revocation hearing, which does not require the full panoply of procedural safeguards associated with a criminal trial." Black, 471 U.S. at 613. In

Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973), the Supreme Court set out the "minimum requirements of due process" for final probation revocation hearings:

> (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds a good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking [probation or] parole.

Id. at 786 (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)). Tennessee courts have held that these due process requirements are met when there is proof that a defendant had actual notice of the charges against him, see State v. Christopher Lynch, No. E2001-00197-CCA-R3-CD, 2002 WL 554462, at *3 (Tenn. Crim. App., at Knoxville, Apr. 16, 2002), *no perm. app. filed*, (citations omitted) ("Though written notice is preferred, . . . actual notice will suffice to meet the due process requirements in a revocation of probation proceeding"), and when the trial court makes oral findings of fact at the probation revocation hearing sufficient to show the grounds for the revocation and the reasons for the court's findings, see State v. Leiderman, 86 S.W.3d 584, 591 (Tenn. Crim. App. 2002).

In the case under submission, the record establishes that the Defendant received written notice of the charges against him through the warrant relating to the alleged probation violation. The warrant clearly stated it was for a violation of Rule 6, and the warrant highlighted the clause of Rule 6 which the Defendant allegedly violated, "[The Defendant] will carry out all lawful instructions [the Probation Officer] give[s] . . . ." The Defendant's probation officer and the Defendant entered into an agreement setting the schedule for the Defendant's community service work, which became part of the Defendant's probation file. The Defendant subsequently breached that agreement, thus violating the aforementioned clause of Rule 6 of his probation. The Defendant testified that he had breached the agreement, stating, "I agree I haven't completed my public service work as assigned by Mr. McGranahan. . . ." Therefore, because the Defendant received written notice of the charges against him in the arrest warrant, the Defendant is not entitled to relief on this issue.

B. Sufficiency of the Evidence

We begin by first noting that, although the Defendant claims a violation of due process because of insufficient evidence, he appears to also argue that the trial court had insufficient evidence to revoke his probation. Specifically, the Defendant seemingly contends that the trial court was not presented enough evidence to find a violation of Rule 6. Thus, we will determine whether the trial court abused its discretion by revoking the Defendant's probation without hearing sufficient evidence to support the revocation.

The decision to revoke probation is in the sound discretion of the trial judge. State v. Kendrick, 178 S.W.3d 734, 738 (Tenn. Crim. App. 2005); State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The judgment of the trial court to revoke probation will be upheld on appeal unless there has been an abuse of discretion. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). To find an abuse of discretion in a probation revocation case, the record must be void of any substantial evidence that would support the trial court's decision that a violation of the conditions of probation occurred. Id.; State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). Proof of a probation violation is sufficient if it allows the trial court to make a conscientious and intelligent judgment. State v. Milton, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984). In reviewing the trial court's finding, it is our obligation to examine the record and determine whether the trial court has exercised a conscientious judgment rather than an arbitrary one. Mitchell, 810 S.W.2d at 735.

At trial, the Defendant's probation officer testified that he and the Defendant entered into an agreement, which the Defendant signed, that established a schedule of the Defendant's court ordered community service. The Defendant's probation officer testified that the Defendant violated Rule 6 by breaching this agreement; thereby not carrying out all lawful instruction his probation officer gave. The Defendant testified, "I agree I haven't completed my public service work as assigned by Mr. McGranahan . . . ."

On appeal, the Defendant claims that the trial court possessed insufficient evidence upon which it could find that a probation violation occurred because the alleged violation of Rule 6 was directly related to Rule 10 of the Probation Order from Case No. 10897-A. Additionally, the Defendant claims that:

> No evidence or testimony were [sic] presented that made it clear to the [c]ourt that there were indeed two different Probation orders executed by the Probation Officer and signed by the [D]efendant, nor that they contained different terms and/or conditions. Namely that one order required Public Service Work and the other order had no such requirement [sic].

There are no copies of probation orders in the record. The Defendant attached what he claims to be copies of the original probation orders as an Appendix to his brief. Our Rules of Appellate Procedure allow an appellant to file an appendix containing relevant portions of a record. See Tenn. R. App. P. 28. However, the documents filed in an appendix must also be included in the record. See State v. Matthews, 805 S.W.2d 776, 783-84 ("Rule 28, Tennessee Rules of Appellate Procedure, does not contemplate attaching a transcript of proceedings to a brief when the transcript has not been made a part of the record."); see LaBryant King v. State, No. M2004-01371-CCA-R3-PC, 2005 WL 1307802, at *3 (Tenn. Crim. App., at Nashville, June 1, 2005), *perm. app. denied* (Tenn. Dec. 19, 2005). Because the probation orders were not included in the record, this Court cannot analyze the Defendant's issues regarding the probation orders.

Even if copies of the probation orders were included in the record, we could not say that the

evidence is insufficient to support the trial court's decision that a violation of the conditions of probation occurred. At the revocation hearing, the State argued that the Defendant violated the portion of Rule 6 of his probation order which stated, "[The Defendant] will carry out all lawful instructions [the Probation Officer] give[s]." The Defendant's probation officer testified that the Defendant violated an order given by his probation officer, and the Defendant admitted that he did not perform the community service work as ordered by his probation officer. Therefore, the Defendant is not entitled to relief on this issue.

C. Right to Counsel

In his appellate brief, the Defendant makes a cursory claim that the trial court erred in failing to appoint the Defendant counsel at the revocation hearing. The Defendant, however, did not address the issue in his brief. He only mentioned the issue while arguing that his due process rights were violated by insufficient notice stating, "A pro se [Defendant] could not have reasonably been expected to understand the nature of the violation alleged against him [in] the Violation of Probation Warrant, nor be expected to understand evidence either not presented or inaccurately presented or described."

Initially, we note that the Defendant has risked waiving the issue by failing to reference the appellate record in his brief to this Court. Under Rule 10(b) of the Rules of the Court of Criminal Appeals, "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." While the Defendant has risked waiver, we will nonetheless address the Defendant's claims on their merits.

Although the right to counsel is guaranteed in criminal cases, Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), the right to counsel is not constitutionally guaranteed at a revocation hearing. Gagnon v. Scarpelli, 411 U.S. 778, 789-790 (1973); Young v. State, 539 S.W.2d 850, 854 (Tenn. Crim. App.); see Black v. Romano, 471 U.S. 606, 612 (1985); United States v. Hartsell, 277 F. Supp. 993 (Fed. Dist. Ct. 1967). Because a number of Constitutional rights are guaranteed to a defendant at a probation revocation hearing, the more prudent rule is to appoint counsel in each revocation hearing where a defendant is indigent and seeks counsel. See Gagnon, 411 U.S. at 790.

In the case under submission, the trial court did not err by not appointing the Defendant counsel at the revocation hearing. Furthermore, nothing in the record indicates that the Defendant was unaware of a need for counsel. In fact, the trial court reminded the Defendant that he was to hire a lawyer and asked if he had done so, and the Defendant responded that he was not able to obtain a lawyer. Clearly, the Defendant knew he should or could obtain counsel. The Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the trial court's judgment.

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ROBERT W. WEDEMEYER, JUDGE